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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID SMITH, Defendant and Appellant.	F057180 (Super. Ct. No. 1229778) **OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Donald E. Shaver, Judge.

Brian A. Wright, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant David Smith was convicted by a jury of pimping (Pen. Code, § 266h, subd. (a)),[1] battery on a cohabitant (§ 273.5, subd. (a)) and making criminal threats (§ 422). At trial, in support of the criminal threat count, the trial judge permitted the investigating deputy to testify that the victim stated defendant threatened to kill her. Defendant contends that the deputy's testimony was inadmissible hearsay, and that the other evidence was insufficient to convict defendant of making a criminal threat. Defendant further contends that even if there was sufficient evidence to convict him of making a criminal threat, the sentence imposed for that conviction should have been stayed under section 654. We reject each of these contentions and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

The victim in this case was M.E., age 21, who admitted she had been a prostitute since she was 18 years old. M.E. testified that she met defendant in March of 2007, when defendant asked her if she wanted to go to Modesto with him to live in his cousin's house. M.E. was homeless, and she accepted defendant's offer and moved into a house on Bystrum Street in Modesto with defendant and six others. M.E. testified that defendant claimed he loved her, and they had a "romantic," sexual relationship, but she was frustrated and confused because it was obvious that defendant was seeing other women at the same time.

In Modesto, defendant had M.E. keep working as a prostitute. M.E. was advertised on Craig's List, appointments for sexual "encounters" were set up by cell phone, and M.E. would give all the money she received to defendant. After M.E. had been in Modesto about one week, defendant took her to Oakland to "walk the street," where she was picked up by three males who punched her in the stomach and raped her.

After a month and a half, M.E. told defendant that she had had enough and wanted to go home. Defendant assured her that he would make arrangements for her to visit her

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

family, but no arrangements were ever made. Later, M.E. again informed defendant that she wanted to go home and that she "didn't want to do what [she] was doing anymore." Defendant refused to allow her to leave, telling her that "[she] was his." He threatened M.E. that if she tried to escape, he would beat her up and that he was "arranging consequences." He slapped her when she verbalized that she did not want to walk the street. M.E. testified of defendant's brutality toward her during this time period after she made known her desire to leave, including that he hit her "more times than [she could] count," punched her in the face, struck her with a belt, tackled her and choked her. The district attorney introduced photographs at trial showing various bruises and red marks on M.E.'s neck, face, arm and legs from being beaten and choked by defendant.

On April 21, 2007, M.E. told defendant that she was not feeling well and did not want to walk the street. Defendant began yelling and screaming at her, and she was afraid for her life and ran out of the house. Defendant ran after her, grabbed her hair, punched her, and choked her while he tried to force her back into the house. She was able to break out of his grip and began to run toward a nearby convenience store. She quickly called her sister on a cell phone and told her to call the police and have them meet her at the store. Defendant chased her down with his car and tried to throw her into the car. She was able to escape and she ran the remaining distance to the store, where she saw Deputy Kari Abbey.

Deputy Abbey testified that on April 21, 2007, in response to an emergency dispatch, she drove to a convenience store in Modesto to locate a young female. When Abbey pulled into the parking lot, she saw a frantic female run out of the store who matched the description that had been provided to Abbey. The female identified herself as M.E., and told Abbey that defendant had been hitting her and that he had threatened her repeatedly, saying "You fucking leave, I will kill you." According to Abbey, when M.E. relayed this information, she was very scared, looking over her shoulder to see who

was coming, crying, thankful that the deputy was there to help her, and fearful the deputy might leave.

On October 31, 2008, the Stanislaus County District Attorney filed a criminal information charging defendant with pimping (§ 266h, subd. (a)), battery on a cohabitant (§ 273.5, subd. (a)), false imprisonment (§ 236) and making criminal threats (§ 422). On December 12, 2008, the jury found defendant guilty on all counts except that of false imprisonment. On January 30, 2009, the trial court sentenced defendant to a total term of eight years eight months, computed as follows: The upper term of six years on the first count (pimping), plus one year for the prior prison term enhancement (§ 667.5, subd. (b)), plus one year (one-third the midterm of three years) on the second count (battery), plus eight months (one-third the midterm of two years) on the fourth count (criminal threats). Defendant timely filed his notice of appeal.

DISCUSSION

Defendant challenges his conviction on the criminal threat count on the ground that the evidence at trial was insufficient to prove his guilt. The first part of defendant's argument is that the evidence failed to show M.E. was in sustained fear as a result of the threats. The second part of defendant's argument is that the evidence was insufficient to support the criminal threat conviction apart from Deputy Abbey's testimony, which evidence he argues should have been excluded on the ground that it was inadmissible hearsay. We now consider these contentions.

I. There Was Sufficient Evidence to Support the Criminal Threat Conviction

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) "Reversal … is unwarranted unless it appears 'that upon no

hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*Ibid.*)

We begin with a summary of the elements that must be established to support a conviction for making a criminal threat. "In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement … is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, … so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation.]" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228.)

Defendant contends that there was insufficient evidence to show that M.E. was reasonably in sustained fear of her safety. "Section 422 … requires that the threat be such as to cause a reasonable person to be in *sustained fear* for his personal safety. The statute is specific as to what actions and reactions fall within its definition of a [criminal] threat. The phrase to 'cause[] that person reasonably to be in sustained fear for his or her own safety' has a subjective and an objective component. A victim must actually be in sustained fear, and the sustained fear must also be reasonable under the circumstances." (*In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139-1140.) Additionally, for fear to be "sustained," it must exist for a period of time that extends beyond what is momentary or fleeting. (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.)

Contrary to defendant's assertion, there was substantial evidence presented in the trial court to permit the jury to conclude beyond a reasonable doubt that M.E. suffered actual, reasonable and sustained fear for her safety as a result of defendant's threatening words. M.E. testified that at the time she tried to get away from defendant, he screamed and chased her and she "was seriously scared for [her] life." She testified that while fleeing to escape, she cell-phoned her sister to contact the police for emergency help. She also gave an account of defendant's prior acts of violence against her, and there was photographic evidence of the bruises and choke marks defendant had inflicted on her. Since defendant had done such things to M.E. in the past, it was reasonable for her to fear that he would carry out his threats. Further, Deputy Abbey testified not only of what M.E. told her concerning defendant's death threats, but of M.E.'s palpable fear: She was "[v]ery, very scared," frantic, crying, and constantly looking over her shoulder to see if someone was coming. We hold these facts amply support the jury's conclusion that M.E.'s fear was subjectively real, objectively reasonable, and sufficiently prolonged to satisfy the requirements of section 422.

II. The Trial Court Properly Admitted Deputy Abbey's Testimony

In his attempt to show the evidence was insufficient to support the criminal threat conviction, defendant argues that Deputy Abbey's testimony regarding the death threats was inadmissible hearsay that the jury should not have heard or considered. Defendant's contention fails for two basic reasons.

First, defendant's contention fails because he failed to object in the trial court. The trial transcript shows that when the district attorney asked Deputy Abbey whether M.E. said defendant threatened her, Abbey responded yes. The district attorney then proceeded to ask whether M.E. communicated the nature of the threat that defendant had made. Abbey answered that M.E. told her defendant had threatened M.E. several times,

"You fucking leave, I will kill you." No objection was raised to this particular testimony.[2] Failure to make a specific and timely objection in the trial court on the ground of inadmissible hearsay forfeits that claim on appeal. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Wheeler* (1992) 4 Cal.4th 284, 300; Evid. Code, § 353.) A specific objection must be made to allow the trial court to make an informed ruling on the objection and to enable the party proffering the evidence to cure any defect in the evidence or foundational showing. (*People v. Mattson* (1990) 50 Cal.3d 826, 854.) This process was completely bypassed below due to defendant's failure to object. We conclude that defendant's hearsay argument was forfeited.[3]

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2 Defendant argues an objection *was* made, but the record clearly shows otherwise. The referenced objection was to an earlier question about whether M.E. told Deputy Abbey how she came to reside with defendant. When defendant objected to that question, the district attorney argued that the testimony was admissible under the hearsay exception for prior consistent statements of a witness. The trial court ruled that it would "allow the question." In his reply brief, defendant argues that it would have been *futile* to object to the question subsequently posed to Abbey about whether M.E. mentioned any of defendant's threats, since the trial court had previously overruled his hearsay objection to the earlier question. (See *People v. Chatman* (2006) 38 Cal.4th 344, 380 [where it was clear after several objections were overruled that a particular "line of questioning" was going to be allowed, further objections were futile].) We reject defendant's futility argument. There was nothing in the trial court's ruling on defendant's single objection to a prior question that signaled the trial court would be allowing *all* hearsay responses from the witness. No particular "line of questioning" had been allowed over objections such that further objections would have been futile. We conclude defendant was required to make a specific and timely objection, without which his evidentiary claim was forfeited. (*People v. Waidla, supra,* 22 Cal.4th at p. 717.)

3 In a footnote in his reply brief, defendant claims that his attorney's failure to object constituted ineffective assistance of counsel. We disregard matters raised in a perfunctory manner without adequate argument (*People v. Stanley* (1995) 10 Cal.4th 764, 793), especially when raised for the first time in a reply brief (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 322). In any event, we reject the claim of ineffective assistance of counsel because the record fails to demonstrate a lack of any tactical purpose for failure to object (*People v. Lucas* (1995) 12 Cal.4th 415, 442), and the evidence was ultimately admissible under a hearsay exception.

Second, the testimony was clearly admissible under the spontaneous statement exception to the hearsay rule. Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "'[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief.'" (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588.) Here, when M.E. frantically told Deputy Abbey about the death threats, she had just escaped from defendant's violent pursuit and she was obviously under the stress of an overwhelming panic and fear of what defendant would do to her.

Although it was not certain from the testimony exactly how much time had passed since defendant's threats were made,[4] the immediate context of the threats was M.E.'s attempt to leave him, which is exactly what she was in the process of doing when she ran to Deputy Abbey. Additionally, Abbey's testimony was that defendant's threats were repeated to M.E. "several times." These facts, combined with the extent of M.E.'s panic and fear, showed that M.E.'s statements to Abbey were made while still under the stress of defendant's threats and were not the product of reflection and deliberation. (See *People v. Farmer* (1989) 47 Cal.3d 888, 903 [the crucial element in determining whether

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[4] Defendant is in no position to argue that the district attorney did not present a more specific evidentiary foundation for the hearsay exception, since defendant did not object. Having failed to object, defendant is solely responsible for any evidentiary void regarding exceptions to the hearsay rule. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 717.) Nevertheless, we find that the record adequately supports the hearsay exception for spontaneous statements under Evidence Code section 1240.

an out-of-court statement is admissible as a spontaneous declaration is the mental state of the speaker].) On the record before us, it is clear the testimony was admissible as a spontaneous statement under Evidence Code section 1240.[5]

For all these reasons, defendant's inadmissible hearsay claim is rejected.

III. Stay of Criminal Threat Sentence Was Not Required Under Section 654

Finally, defendant contends that the sentence for his criminal threat conviction should have been stayed pursuant to section 654. We disagree.

Section 654, subdivision (a), provides as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Under section 654, a defendant may not receive multiple sentences where a single criminal act or indivisible course of conduct results in violation of more than one criminal statute. (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044, citing *People v. Harrison* (1989) 48 Cal.3d 321, 335.) The statute serves the purpose of preventing punishment that is not commensurate with a defendant's criminal liability. (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1088.)

"'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor.'" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) A court of appeal reviews section 654 multiple sentencing

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5 We note the People did not argue that Deputy Abbey's testimony might be admissible for a nonhearsay purpose of merely proving M.E.'s state of mind of suffering sustained fear, which is an element of the criminal threat offense. Rather, the People conceded the testimony was to prove the truth of the matter asserted.

issues under a substantial evidence standard. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564.) The trial court has broad discretion to determine whether section 654, subdivision (a), applies. (*People v. Garcia, supra,* at p. 1564.) The appellate court must view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. (*Ibid.*)

Here, the testimony at trial showed defendant made multiple threats against M.E., including that he would "beat her up" and would kill her if she left, and the testimony further showed that he inflicted multiple batteries upon her. The beatings apparently occurred on multiple occasions over a period of many days. It is one thing to make verbal threats of violent harm to terrorize someone into not running away; it is quite another to maliciously carry out such threatened harm through repeated acts of violent battery. (See *People v. Parrish* (1985) 170 Cal.App.3d 336, 343 [distinguishing assault and infliction of great bodily injury in finding no double punishment].) We agree with the People that the two types of conduct were distinct and were not indivisible. These were differing actions and objectives which could be punished separately. Therefore, the trial court did not err in failing to stay the criminal threat sentence.

DISPOSITION

The judgment is affirmed.

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Kane, J.

WE CONCUR:

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Wiseman, Acting P.J.

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Levy, J.